# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

**No.** .....

I. H. NAKDIMEN, H. S. NAKDIMEN, A. F. HOGE, AND GUS KRONE, PETITIONERS,

VS.

LAZARE BAKER, RESPONDENT.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### THE OPINIONS OF THE COURTS BELOW.

The opinion of the Court of Appeals for the Eighth Circuit on the first appeal is reported in *Nakdimen* v. *Baker*, 100 Fed. (2d) 195. The opinion on the second appeal has not been yet officially reported. Said opinion is found in second R. 40-48.

## II.

## JURISDICTION.

1. The jurisdiction of this court to grant the writ of certiorari is found in United States Code, Title 28, Section 347, as amended, and the cases cited in paragraph 4 below.

2. The date of the judgment in the Court of Appeals is May 14, 1940. A petition for a rehearing was filed (second R. 49), and that petition was denied May 27, 1940 (second R. 57). On June 6, 1940, the Circuit Court of Appeals for the Eighth Circuit made an order withholding the mandate for thirty days from and after June 6, 1940, and thereafter if petition for certiorari be duly filed.

3. The "Second Amended Petition" attempts to state a cause of action for damages for breach of contract. Counsel for petitioners do not concede that said amended complaint states a cause of action for breach of contract. It is not alleged therein that there is a breach of contract and damages are not described nor claimed. Candidly, the said Second Amended Petition seems to be a suit to recover on the contract for the amount of the note with interest before it was due. It is not necessary, however, to argue or to determine that question. The opinion of the Court of Appeals, above referred to, decides the several important local questions contrary to the Arkansas law and the decisions of the Supreme Court of Arkansas and contrary to the decisions of this court. Under the decisions of this court, it is error for the federal court to decide important local questions contrary to the decisions of the courts of the state where the action is brought and is pending.

4. The decisions of this court believed to sustain the jurisdiction are as follows:

*Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.
*Wichita Royalty Co.* v. *City National Bank,* 306 U. S. 103.
*Texarkana, Texas,* v. *Arkansas-Louisiana Gas Co.,* 306 U. S. 188.
*Cities Service Oil Co.* v. *Dunlap,* Advance Opinions of the Supreme Court of the United States, 1939-1940, page 185.

Federal courts are bound by the applicable principles of state law.

*New York Life Ins. Co.* v. *Jackson,* 304 U. S. 261.
*Hudson* v. *Moonier,* 304 U. S. 397.
*Railroad Co.* v. *Los Angeles Corp.,* 280 U. S. 145.

## III.

## STATEMENT OF THE CASE.

It is believed that the statement of the case made in the summary and short statement is sufficient, and therefore reference is made to that as a compliance with the rule.

## IV.

## SPECIFICATION OF ERRORS.

1. The Court of Appeals erred in not dismissing this case when it was determined by that court that the case was controlled by the decision of the Supreme Court of Arkansas in *Grist* v. *Lee,* 124 Ark. 206, said error occurring in both appeals.

2. The Court of Appeals erred in holding that the suit could be changed from a suit in tort to a suit for

damages for breach of contract, and in refusing to dismiss said suit as the Arkansas law required.

3. The Court of Appeals erred in directing and permitting the respondent to occupy conflicting positions in this litigation.

4. The Court of Appeals erred in holding that the petitioner, I. H. Nakdimen, breached the contract on December 7, 1935.

5. The Court of Appeals erred in not holding that Baker, by his own evidence, and by the benefit which he derived from drawing his salary until February 21, 1936, waived delivery on December 7, 1935.

6. The Court of Appeals erred in refusing to hold that Baker, when on February 3, 1936, he demanded performance by Nakdimen, thereby waived any previous breach by Nakdimen, if there was one, and by such demand kept the contract alive for both parties.

7. The Court of Appeals erred in not decreeing specific performance in favor of Nakdimen against Baker.

Specification of error number 8 is embodied in the above.

## V.

## ARGUMENT.

### Summary.

A summary of the points to be argued is fully stated in the above Specification of Errors.

Under the decisions of Arkansas, the cases being cited below, parties who are competent to make a contract are entirely competent to change the terms of that

contract. Assuming that this contract of purchase and sale meant that the note and the other documents were to be delivered to Baker December 7, 1935, there was no wrong on the part of Nakdimen in suggesting the delay on the morning of December 7. A contract is not breached unless there is an unqualified and absolute refusal to perform. Nakdimen's request that Baker obtain for Nakdimen certain information concerning the other note was not unreasonable, in view of the course taken by Baker's attorney and Baker on the day before. Hence it was reasonable in Nakdimen to request the information. Baker was not compelled as a matter of law to consent to the delay. By his own evidence, however, he did consent. Necessarily, if the agreement was that the note and the other documents should be delivered to Baker on December 7, it would follow, in view of the conditions under which Baker bought the stock, that Baker's office in the company as secretary-treasurer would be vacated at the final completion of the contract by delivery of the note and the other documents. Baker acquiesced in the postponement by requesting his attorney and his father-in-law to secure the information. Not only that, he did not resign his position on December 7. He retained that position and drew the salary thereof until February 21, 1936. By his own evidence he makes no request for the delivery of the note and the other documents to him between December 7, 1935, and February 3, 1936. The record is a blank as to when the requested information was delivered to Nakdimen, if at all.

The Court of Appeals in its opinion indicates that a consideration was essential to make valid the agreement of Nakdimen and Baker for the delay in the delivery of the note and other documents. The Arkansas

court has held to the contrary, as will be shown by cases cited below. However, there was a consideration. The consideration was the receipt by Baker of his salary until February 21, 1936. Baker, in discussing his efforts to secure the information, states that he obtained it for Nakdimen; but his language does not justify the conclusion that he delivered it to Nakdimen. Assuming that he did deliver it, he failed to answer the question as to when he delivered it. He states that on February 9 when Nakdimen offered to perform fully and completely, that when he (Baker) took the position that he would not receive the note and the other documents unless Nakdimen would agree to pay indefinite attorney's fees and indefinite traveling expenses, Nakdimen requested him to put the proposition in writing. He says he did put it in writing; and when asked whether Nakdimen responded to the writing, he stated that he received a letter from Mr. McDonough on February 19, 1936. He does not give the proposition which he made, nor does he give the McDonough letter. Two days after he received the McDonough letter he resigned, and left for St. Louis in March.

The first fatal error committed by the Court of Appeals was in not dismissing the case or directing the District Court to dismiss it. Under the rule in Arkansas, as shown by the citation of the Arkansas cases, the case should have been dismissed for the reasons stated in the specification of errors above. That question was preserved throughout the second trial and was embodied in the requests of the defendant for findings of fact and declarations of law. The Court of Appeals suggests that the waiver discussed was not pleaded. Said court overlooks the fact that waiver is a species of estoppel, and

that estoppel was pleaded. In addition to that, the Court of Appeals suggests that the question of waiver was not raised in the court below. That contention is flatly controverted by a reference to second record, page 28, and paragraph 6 of defendant's request for findings of fact, and also by the requests for declarations of law, pages 29-30.

It follows, in our humble judgment, that if we are right in any one of the specifications of error above given, the Court of Appeals committed reversible error by refusing to apply the principles of the laws of Arkansas.

I.

**The Court of Appeals erred in not dismissing this case when it was determined by that court that the case was controlled by the decision of the Supreme Court of Arkansas in *Grist* v. *Lee*, 124 Ark. 206, said error occurring in both appeals.**

In the first opinion of the Court of Appeals (*Nakdimen* v. *Baker*, 100 Fed. (2d) 195) it was declared plainly that this case was controlled by the decision of the Supreme Court of Arkansas in *Grist* v. *Lee*, 124 Ark. 206; but the court, in our opinion inadvertently misunderstanding the full effect of the decision in Grist vs. Lee, instead of dismissing the case, remanded it and suggested amendments.

The petitioner filed at once in that court a petition for a rehearing, calling attention to the fact that instead of remanding the case the court could enter an order dismissing it, or enter an order directing the District Court to dismiss it. Since the case is controlled by Grist vs.

Lee, a case identically the same as to facts and principles of law, the decision of the court is a plain violation of the rights of the petitioner in failing to grant the relief under the laws of the State of Arkansas. The petition for rehearing was denied.

The mandate was filed in the lower court (second R. 2) January 26, 1939. On February 4, 1939 (second R. 8), the respondent filed what is called "Second Amended Petition." The petitioner filed a motion to dismiss that amended complaint (second R. 11). The third ground of that motion to dismiss has this language:

> "If the present action is one for breach of contract, it is an attempt to change from a tort action to a contract action, and under the decisions of the Arkansas courts that cannot be done, and therefore this cause must be dismissed because it cannot be maintained upon conversion and it cannot be changed from conversion to contract."

The court denied that motion; petitioner excepted, and set up in the answer the same defense, and in the request for findings of fact and conclusions of law (second R. 27) raised the same question. The Court of Appeals on the first appeal correctly held that this case is clearly controlled by the decision of the Supreme Court of Arkansas in *Grist* v. *Lee*, 124 Ark. 206 (second R. 7).

The precise question came before the Supreme Court of Arkansas in the case of *A. F. Shapleigh Hardware Co.* v. *Hamilton*, 70 Ark. 319. That case is controlling, absolutely, on the question under consideration. The complaint in that case, like the one in the case at bar, had alleged some facts which might belong to a suit for damages for breach of contract, and some facts that might be relevant in a complaint on the contract, and

some facts which might be relevant in a conversion suit. In holding that the complaint could not be amended so as to change from a tort suit to a suit for breach of contract, the Supreme Court of Arkansas said:

> "It was error in the court to change the form of the action, by striking out or treating as surplusage the principal allegations—those that give form to the action—because, perchance, there may be facts stated by way of inducement spelled out which would, when put in proper form, have sustained an action *in assumpsit.* The defendant was called upon to answer the allegations of fraud, and not to resist a claim to recover *in assumpsit.* The plaintiff was not, under the complaint, entitled to a verdict and judgment as in an action upon the note. While the code is liberal in disregarding technical defects and omissions in pleading, and in allowing amendments, it does not permit a cause of action to be changed, either because the plaintiff fails to prove the facts necessary to sustain it, or because he has mistaken his remedy, and the force and effect of the allegations of his complaint."

In quoting from Pomeroy's Code Remedies, the Arkansas court in the same case said:

> "By far the most important distinction directly connected with this doctrine is that which subsists between causes of action *ex contractu* and those *ex delicto.* It is settled, by an almost unanimous series of decisions in various states, that if a complaint or petition in terms alleges a cause of action *ex delicto,* for fraud, conversion, or any other kind of tort, and the proof establishes a breach of contract, express or implied, no recovery can be had, and the action must be dismissed, even though by disregarding the averments of tort, and treating them as surplusage, there might be left remaining the necessary and sufficient

allegations, if they stood alone, to show a liability upon the contract." * * * "A party cannot sue in tort and recover in contract or *assumpsit.*"

We respectfully submit that what the court said in said first opinion (second R. 7), "The most that he (Baker) had was a right of action for breach of contract and an equitable lien upon the 200 shares of stock," was *obiter.* It is so because the court declared that that appeal "presents one question necessary to its determination" (second R. 5).

The following authorities sustain that suggestion:

*Carroll* v. *Lessee of Carroll,* 16 How. (U. S.) 265.
*Connor* v. *Blackwood,* 176 Ark. 139.
*Scruggs* v. *State,* 131 Ark. 320.
*Payne* v. *State,* 124 Ark. 20.
*United States* v. *Waite* (8 CCA), 33 Fed. (2d) 567.

II.

**The Court of Appeals erred in holding that the suit could be changed from a suit in tort to a suit for damages for breach of contract, and in refusing to dismiss said suit as the Arkansas law required.**

It is settled law in Arkansas that a cause of action in tort cannot be joined with a cause of action on contract. In so holding in the case of *Unionaid Life Ins. Co.* v. *Crutchfield,* 182 Ark. 825, the Supreme Court of that state, among other things, said:

"It is clear that the evidence to sustain one allegation would be different from that necessary to sustain the other, and therefore they ought not to have been joined."

See, also, *Conant* v. *Storthz,* 69 Ark. 209.

The original amended petition was a plain conversion suit—a suit in tort. The facts alleged therein (first R. 2), as the Court of Appeals held, were insufficient to sustain conversion. The respondent asserted that they were sufficient and that his cause of action against the petitioner was a tort action. The inconsistency of that position is one of the things that absolutely denies his recovery in this. That is not the point here. Said amended petition, being the complaint on which the case was first tried, did not state facts sufficient to constitute a cause of action for breach of contract. The opinion of the Court of Appeals on the first appeal actually amounts to such a holding, and hence it appears that said court suggested an amendment. But there was nothing to amend in the way of a contract action.

Besides, under the laws of Arkansas, as shown elsewhere herein, no party is permitted to change his alleged cause of action from a tort to a contract action, or from a contract action to a tort. When that situation arises, the complaint must be dismissed. The petitioner, at every turn in the case under the second amended complaint, preserved the question that the plaintiff was not entitled to maintain the contract action, but that the complaint must be dismissed. See petitioner's motion to dismiss (second R. 11). Following that, the petitioner made a motion to make the second amended complaint more definite and certain (second R. 12). Those motions were overruled by the court and exceptions saved. Then in the answer (second R. 15) the petitioner expressly stated that he did not waive his motion to dismiss. Then in the request for findings of fact and conclusions of law, the same question was duly preserved. The principles declared by the Supreme Court of Arkansas in *Unionaid*

*Life Ins. Co.* v. *Crutchfield,* and the other case therein cited, in our opinion, make it certain that the respondent could not change from a conversion suit to a suit for breach of contract.

There exists another reason precluding a change from a tort action to a contract action in this case. The Court of Appeals in the opinion, in discussing the question of whether or not Nakdimen breached the contract, after citing authorities, which are not in point here because of the waiver of the breach (second R. 46), states in substance that counsel have not called the court's attention to any Arkansas decisions or statutory provisions. In our brief in the Court of Appeals we called that court's attention to Section 2159 of Pope's Digest, which reads as follows:

> "An attempted transfer of title to a certificate or to shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer, and the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts."

As we view it, that section gives Baker a right upon the contract to sue for the amount due on the contract when the note becomes due. The statute of frauds does not apply, because the Arkansas court has held that part performance takes the case out of the statute of frauds. *Minich* v. *Bass,* 183 Ark. 350.

The bringing of the conversion suit precluded petitioner from requesting an extension of the note, as the conversion suit was not disposed of until after the three years had expired. Besides, Baker did not give the sixty days' notice, required by the contract, of the maturity. See defendant's answer (second R. 17).

III.

**The Court of Appeals erred in directing and permitting the respondent to occupy conflicting positions in this litigation.**

Since the suggestion of the Court of Appeals as to amending the complaint so as to attempt to state a cause of action for damages for breach of contract was *obiter*, that suggestion was not binding upon that court or any other court. Since the plaintiff could not himself take that course, the court cannot legally direct that he should. If that were permissible, then the court could make an election for a litigant.

In the case of *Cleveland* v. *Biggers*, 163 Ark. 277, it was held by the Supreme Court of Arkansas:

> "However the right of election of remedies rests with the plaintiffs and not with us, and we cannot make the election for them."

IV.

**The Court of Appeals erred in holding that the petitioner, I. H. Nakdimen, breached the contract on December 7, 1935.**

There are two controlling reasons which prove that there was no breach of the contract by Nakdimen on December 7, 1935. The first reason is that the language of Nakdimen as given by Baker is wholly insufficient, under the law of Arkansas, to amount to an absolute refusal to perform the contract (first R. 44, 45, 46, 47 and 51). The second reason is conclusive. On the point that the language of Nakdimen is insufficient to show an absolute refusal, reference is made to the following cases:

*Majestic Milling Co.* v. *Copeland*, 93 Ark. 195.
*Spencer Medicine Co.* v. *Hall*, 78 Ark. 336.
*Truemper* v. *Thane Lumber Co.*, 154 Ark. 524.

The Supreme Court of Arkansas adopts the language of the Supreme Court of Minnesota in the case of *Armstrong* v. *St. P. & P. Coal & Iron Co.*, 48 Minn. 113.

In the *Majestic Milling Company* case, *supra*, the Supreme Court of Arkansas said:

> "But the rule is well established that in order for one party to a contract to be justified in treating it as broken by the other and claiming damages for the breach, there must have been a distinct and unequivocal intention manifested either by the words or conduct of the other not to perform the contract."

In the case of *Goldwyn Distributing Corp.* v. *Breneman* (3 CCA), 13 Fed. (2d) 105, the Court of Appeals held plainly and squarely that a temporary postponement to settle another controversy was not a breach of the contract, using this language:

> "Nothing short of a positive and unequivocal refusal to perform a contract will excuse the other party from tendering performance, and a mere request to suspend performance until an existing controversy is settled is not sufficient."

The court cited the following cases from this court:

*United States* v. *Smoots*, 82 U. S. 36.
*Dingley* v. *Oler*, 117 U. S. 490.

*The second reason*, which shows absolutely that there was no breach of the contract on December 7, 1935, is that Baker waived the delivery on that day and consented to and acquiesced in, for a valuable consideration, the

delay. Any provision in a contract may be waived by the parties thereto.

*Empire Gas & Fuel Co.* v. *Stern* (8 CCA), 15 Fed. (2d) 323.
*Globe Mutual Life Ins. Co.* v. *Wolff*, 95 U. S. 326.

*A breach of contract is waived if either party acts on the theory that the contract is still in force.*

*In re Hook*, 25 Fed. (2d) 498.

If Nakdimen breached the contract, Baker had an election either to accept the breach or to treat the contract as still valid.

*In re Malco Milling & R. Co.*, 32 Fed. (2d) 825.
*Gregg* v. *England Loan Co.*, 171 Ark. 930.
*First National Bank* v. *Tate*, 178 Ark. 1098.
*Wolf* v. *Alexander Film Co.*, 186 Ark. 838.
*Hodges* v. *Taft*, 194 Ark. 259.

In the case last cited the Arkansas court said (263):

> "Anyone for whose benefit a provision in a contract is made may waive it, and it is therefore optional whether he will enforce it."

That language applies to Baker clearly, since the time of delivery of the note was for the benefit of Baker.

At no time, beginning December 7, 1935, down to and including February 9, 1936, did Baker give to Nakdimen the slightest hint that if Nakdimen did not perform, the contract would be treated as breached.

In the case of *Malmquist* v. *Peterson*, 149 Minn. 223, 183 N. W. 138, the court said:

> "This court has held that if after default in performance of a contract within the time stipulated the party entitled to take advantage of the default, with knowledge of the facts, treats the contract as still in force, or deals with the other party in a manner consistent only with a purpose on his part to regard the contract as still subsisting and not terminated by the default, he waives the default. In such event, strict performance according to the terms of the contract having been waived, a reasonable time and opportunity should be allowed to the vendee in which to make payment."

On the point that Baker's waiver prevented there being a breach by Nakdimen on December 7, we refer to the case of *McCormick* v. *F. & C. Co.*, 307 Pa. 434, 161 Atl. 532. In that case the Pennsylvania court said:

> "Many authorities hold, and so far as we are aware there are none to the contrary, that whenever the unequivocal act of one of the parties evidences an intent not to fulfill his executory agreement at the time specified in it, the other party may, if he does so promptly and unequivocally, accept such breach and sue at once; but until he does accept it, the act operates as a tender only. If he does not promptly and equivocally accept the tender, the contract remains in full force and effect according to its terms for the benefit of both parties to it."

The Pennsylvania court cites as an authority on the proposition the case of *Roehm* v. *Horst*, 178 U. S. 1.

In the case of *Atlantic Bitulithic Co.* v. *Town of Edgewood*, 103 W. Va. 137, 137 S. E. 223, the court said:

> "There is no breach so long as the injured party elects to treat the contract as continuing."

When Baker acquiesced in the delay and consented thereto, and received his salary until February 21, 1936, as a matter of law he waived any previous breach. His conduct and his language up to February 9, 1936, was upon the theory that the contract was still in existence. The laws of Arkansas, therefore, will not permit him to take a different position on February 9, 1936, or thereafter. The following cases, it is respectfully submitted, are conclusive upon Baker being estopped to claim a breach on December 7, 1935, or at any other time:

*Majestic Milling Co.* v. *Copeland*, 93 Ark. 195.
*A. F. Shapleigh Hardware Co.* v. *Hamilton*, 70 Ark. 313.
*Grist* v. *Lee*, 124 Ark. 206.
*Belding* v. *Whittington*, 154 Ark. 561.
*Gregg* v. *England Loan Co.*, 171 Ark. 930.
*Cox* v. *Harris*, 64 Ark. 213.
*Bush* v. *Barksdale*, 122 Ark. 262.
*Cleveland* v. *Biggers*, 163 Ark. 377.

If a party continues to treat a contract as a subsisting obligation, he waives any breach thereof.

*Nelson* v. *Chicago M. & L. Co.*, 76 Fed. (2d) 17.
*Majestic Milling Co.* v. *Copeland*, 93 Ark. 195.

In the case last cited, in addition to what has been quoted therefrom, the court said:

> "There was some delay in making shipments, but plaintiff consented to it, and the last request for shipment was promptly complied with. He waived the delay by consenting to it."

In *Tidwell* v. *Southern Engine & Boiler Works*, 87 Ark. 52, the Arkansas court held in substance that a party to a contract who urges its performance and completion waives thereby any breach by delay.

V.

**The Court of Appeals erred in not holding that Baker, by his own evidence, and by the benefit which he derived from drawing his salary until February 21, 1936, waived delivery on December 7, 1935.**

The following cases, in addition to those above cited on the preceding point, seem to be in point:

*In re Hook*, 25 Fed. (2d) 498.
*Gregg* v. *England Loan Co.*, 171 Ark. 930.
*Roswell* v. *Drainage Dist.*, 292 Fed. 29.
*Miami Ry. & Mfg. Co.* v. *Robinson*, 245 Fed. 596.

A waiver once made cannot be recalled.

*First Federal Tr. Co.* v. *First National Bank*, 297 Fed. 353.
*Champion Spark Plug Co.* v. *Auto M. Sand Co.*, 273 Fed. 74.

VI.

**The Court of Appeals erred in refusing to hold that Baker, when on February 3, 1936, he demanded performance by Nakdimen, thereby waived any previous breach by Nakdimen, if there was one, and by such demand kept the contract alive for both parties.**

It seems to be well settled everywhere that a party cannot occupy inconsistent positions. Any positive act indicating an intent to treat the contract as still existing keeps the contract alive for both parties. Baker never said a word nor did an act which indicated that he intended to treat the contract other than as valid until after or on February 9, 1936. He recognized its existence, even when he violated said contract by demanding unnamed attorney's fees and traveling expenses. His every act

up to that time indicated that he treated the contract as alive. He cannot, therefore, take the position now that the contract was not alive. The following Arkansas cases are squarely in point and hold that no person will be permitted either in litigation or otherwise to take inconsistent positions:

*Belding* v. *Whittington*, 154 Ark. 561.
*Bush* v. *Barksdale*, 122 Ark. 262.
*H. G. Vogel Co.* v. *Original Cap. Corp.*, 252 Mich. 129.
*Harrison* v. *Fulk*, 128 Ark. 229.

VII.

**The Court of Appeals erred in not decreeing specific performance in favor of Nakdimen against Baker.**

Under the law of Arkansas, a court of law has no jurisdiction to enforce specific performance.

*Hamilton* v. *Fowlkes*, 16 Ark. 340.
*Greenfield* v. *Carlton*, 30 Ark. 547.
*Dollar* v. *Knight*, 145 Ark. 522.
*Harper* v. *Thurlow*, 168 Ark. 491.

If this lawsuit, by reason of its being started before the effective date of the new federal rules, was under the old rules, then the equitable rights of Nakdimen are fully protected by the decisions of this court.

*Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.
*Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103.

If the new rules do apply to this case, then it should be decided upon equitable principles. The petitioner by his allegations in his answer brought himself well within

the rule of equity on the subject of specific performance, and the facts therein stated entitle him to such performance.

*Grady* v. *Gatlin*, 182 Ark. 184.

The answer of the defendant to the second amended complaint stated the facts which entitled the defendant to a decree of specific performance. Under the rule of law in Arkansas, as is shown by the cases cited under paragraph IV, when a party to a contract, by conduct and otherwise, waives a breach by the other party and treats the contract as existing, and thereafter breaches the contract himself, as did Baker when he refused to accept the note and documents, he may be compelled specifically to perform.

But the Court of Appeals erroneously says Nakdimen breached the contract first and hence cannot have specific performance.

It is submitted that the Supreme Court of Arkansas has settled that question in a number of cases. In the case of *Friar* v. *Baldridge*, 91 Ark. 133, a case cited by the Court of Appeals in its last opinion, the Supreme Court of Arkansas used this language:

> "The following equitable principle formulated by Mr. Pomeroy has been repeatedly approved by this court: 'If there has been a breach of the agreement sufficient to cause a forfeiture, and the party entitled thereto either expressly or by his conduct waives it or acquiesces in it, he will be precluded from enforcing the forfeiture, and equity will aid the defaulting party by relieving against it, if necessary.' "

See *Little Rock Granite Co.* v. *Shell*, 59 Ark. 405.

The points above discussed will be emphasized by calling this court's attention to the errors in the opinion of the Court of Appeals. We are not requesting this court in this petition for certiorari to pass on questions of fact. As elsewhere stated, the errors of the Court of Appeals are based upon a failure to follow the decisions of the Supreme Court of Arkansas on questions of law. The said court (second R. 44), in discussing point 1 of the opinion, admits that it was impossible to determine from the contents of the second amended complaint whether the cause of action was on contract or tort. That admission of the court brings the case squarely within the rule in the A. F. Shapleigh case, and the case of Grist vs. Lee, cited above, and in our opinion requires the reversal of the case, and either its dismissal or the granting of the specific performance against the plaintiff. The other questions in that paragraph of the opinion have already been sufficiently discussed.

The court (second R. 44) then discusses the question of specific performance, and in doing so erroneously fails to follow the Supreme Court of Arkansas showing that there was no breach by Nakdimen on December 7, 1935. We have already sufficiently discussed the questions in that paragraph.

In paragraph 3 (second R. 45) the opinion states that "upon Nakdimen's refusal to deliver the note and pledge on December 7, 1935, Baker immediately acquired a cause of action for breach of contract." The court cites *Grist* v. *Lee, supra,* but that case does not support the court's opinion. Neither do the other Arkansas cases cited in that paragraph furnish any support for the court's conclusion. In the same paragraph (second R. 45) the court suggests that no valid reason existed for

Nakdimen's refusal to make an immediate delivery of the documents on February 3, 1936. The court entirely overlooks Baker's waiver and the salary which was paid him down to February 21, 1936, which was after the petitioner had offered to perform. The court in making that statement also overlooks the decisions from the Arkansas court to the effect that if one party waives a breach, the contract is kept alive for both parties.

The court cites two Arkansas cases (second R. 46) and it will be found upon examining those cases that neither of them supports the court's opinion. The Court of Appeals finds that a promissory note and a pledge of securities are clearly things of fluctuating value. We respectfully submit that whether such things are of fluctuating value depends upon evidence. There is not a particle of evidence in this record tending to show that the note was not of the value assumed, and nothing to show that it was of fluctuating value. Even if its value depended upon the value of the security, there is no evidence that it was fluctuating.

On the same page (second R. 46) the opinion states: "The authorities cited above indicate that Arkansas follows the generally accepted rule." We have not found a single case cited by the court, and none by search of the authorities, which tends to show that Arkansas follows the general rule referred to. For the reasons given heretofore, the rule is not applicable because Baker by his own admission waived the breach, as heretofore demonstrated.

In paragraph 4 (second R. 46) we find a surprising argument in the court's opinion to the effect that there was a "contention that Baker's refusal to accept the un-

conditional tender of performance on February 9, 1936, amounted to a waiver of Nakdimen's prior breach of the contract." The defendant never at any time made that contention. The court states that a short answer to that contention is that Nakdimen did not plead waiver. We urge that Nakdimen did plead waiver, and the court's error on that subject was noticed in our petition for rehearing (second R. 53). In the first place, the rule in Arkansas is that if evidence is admitted without objection, the pleadings will be treated as amended to conform to the proof.

*St. L., A. & T. R. Co.* v. *Triplett,* 54 Ark. 289.
*McElhaney* v. *Smith,* 76 Ark. 68.
*Arkansas Bankers' Assn.* v. *Ligon,* 174 Ark. 234.
*RCA Victor Co.* v. *Dougherty,* 191 Ark. 401.

In addition to that, estoppel was set up by the defendant, and waiver is but a species of estoppel.

*Maloney* v. *M. W. Masonic Assn.,* 40 N. Y. S. 918.
*Knarison* v. *Manhattan Life Ins. Co.,* 140 Cal. 57.
*Kidder* v. *Knights Templars Life Indemnity Co.,* 94 Wis. 538.
*Schwab* v. *Brotherhood of American Yeomen,* 305 Mo. 148.

In discussing said paragraph 4 (second R. 47) the opinion in effect holds that there was no consideration. The Supreme Court of Arkansas, in our opinion, settled that question against the court's view in the case of *First National Bank* v. *Tate,* 178 Ark. 1098. In that case the parties by agreement changed the terms of the old contract. In the instant case, Baker changed the time of delivery by consenting to the delay. The Arkansas court held that the agreement changing the provisions of the

old contract was a sufficient consideration by both parties. In addition to that, we respectfully urge that there was a consideration as heretofore pointed out.

In the same paragraph 4 the court in the opinion states that the matter of waiver cannot be raised for the first time in the Court of Appeals. That question was raised in the District Court by the request of defendant for findings of fact and declarations of law. See second R. page 28, and especially paragraph 6 thereof. The other requests, in our opinion, raise the same question.

## Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers in order that the errors of the Court of Appeals be corrected and set aside, and that the contract may be sustained, and that to such an end a writ of certiorari should be granted and this court should review the decision of the Court of Appeals for the Eighth Circuit and finally reverse said decision.

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